

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|--|---|--------------------------|
| In re Applications of |) | |
| |) | |
| Kidd Communications |) | |
| (Assignor) |) | File No. BAL-20010724AAW |
| |) | |
| and |) | |
| |) | |
| Alan Slater, Trustee, Chief Executive |) | |
| Officer/Clerk of the Superior Court of the |) | |
| State of California |) | |
| (Assignee) |) | |
| |) | |
| For Involuntary Assignment of License of |) | |
| Station KTHO(AM), South Lake Tahoe, |) | |
| California |) | |
| |) | |
| And |) | |
| |) | |
| Alan Slater, Trustee, Chief Executive |) | |
| Officer/Clerk of the Superior Court of the |) | File No. BAL-20010808AAR |
| State of California |) | |
| (Assignor) |) | |
| |) | |
| and |) | |
| |) | |
| Paradise Broadcasting, Inc. |) | |
| (Assignee) |) | |
| |) | |
| For Assignment of License of |) | |
| Station KTHO(AM), South Lake Tahoe, |) | |
| California |) | |

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 2004

Released: July 16, 2004

By the Commission:

1. The Commission has under consideration an Application for Review filed by Chris Kidd d/b/a Kidd Communications ("Kidd") and related pleadings regarding station KTHO(AM), South Lake Tahoe,

California.¹ Kidd requests review of an October 17, 2001, Mass Media Bureau decision (“Staff Decision”)² that affirmed the August 1, 2001, grant of the captioned application for the involuntarily assignment of the license from Kidd to Alan Slater, Trustee, Chief Executive Officer/Clerk of the Superior Court of the State of California (“Trustee”). The Staff Decision also granted the assignment of the KTHO(AM) license from the Trustee to Paradise Broadcasting, Inc. (“PBI”). In contesting both assignments, Kidd raised a single issue: whether the subject assignment applications were filed to effectuate a reversionary interest in the station’s license in violation of Section 73.1150 of the Commission’s rules.³ We find no error in the Staff Decision and deny the Application for Review.

2. **Background.** On July 10, 1995, the Commission granted an assignment of license of KTHO(AM) from PBI to Kidd.⁴ As consideration for the sale of the station, Kidd had executed a promissory note (“Original Note”) which stated that, as security, Kidd “pledges all of the station assets, including but not limited to broadcasting and office equipment, goodwill, and receivables.” That Note further stated that the “assets to be secured will not include any FCC licenses.” Kidd failed to make payments on the Original Note and PBI sued Kidd in California Superior Court (Orange County) (“Orange County Superior Court”).⁵ To settle the litigation, Kidd executed a new promissory note on July 15, 1997 (“New Note”). The New Note contained the following language at issue here:

In the event of a default which is not cured, both parties agree to act reasonably and in good faith to effect an orderly turnover of the station to Paradise.

3. Kidd defaulted on the New Note as well, and PBI initiated foreclosure proceedings.⁶ Extensive litigation followed, including the filing of three Chapter 13 bankruptcy petitions by Kidd, which PBI alleges were tactics to delay disposition in the foreclosure proceedings.⁷ In December 1999, pursuant to the foreclosure proceedings, a public auction was held to dispose of the station’s real property: the transmission facilities, towers and the land which they occupy.⁸ PBI, the successful bidder at auction, acquired title to the real property, but Kidd refused to surrender it. PBI commenced an unlawful detainer action in California Superior Court (El Dorado County).⁹ While the unlawful detainer case was pending, on January 25, 2000, PBI commenced another action in Orange County Superior Court¹⁰ for breach of contract and specific performance to recover the personal property, *e.g.*, studio equipment, furnishings, etc., and to enforce the New Note provision to “act reasonably and in good faith to effect an orderly turnover of the station” to PBI.

¹ The Application for Review was filed on November 16, 2001. Paradise Broadcasting, Inc. and Alan Slater, Trustee, Chief Executive Officer/Clerk of the Superior Court of the State of California, filed a Joint Opposition on December 3, 2001. Kidd filed a Reply on December 10, 2001.

² *Letter to Dan J. Alpert, Esq. and Erwin G. Krasnow, Esq.*, Ref. No. 1800B3-BSH (MMB, Oct. 17, 2001).

³ 47 C.F.R. § 73.1150.

⁴ File No. BAL-19950526EA.

⁵ Orange County Superior Court, Central Dist., Case No. 768532.

⁶ *See* Joint Opposition to Application for Review at 6.

⁷ *Id.* at 6-7.

⁸ *Id.* at 6.

⁹ South Lake Tahoe Superior Court Case No. SVU 2888.

¹⁰ Orange County Superior Court, Central Dist., Case No. 00 CC0 1383.

4. The El Dorado County Superior Court acted first: PBI prevailed in the unlawful detainer action,¹¹ and, on October 16, 2000, took possession of the land together with the towers and transmitter for KTHO(AM). As counsel for Kidd reported, the station then went silent, effective October 17, 2000.¹² On January 25, 2001, the Orange County Superior Court issued a Tentative Decision finding Kidd in default and awarding possession of the KTHO(AM) personal property to PBI ("First Tentative Decision"). The First Tentative Decision denied, however, PBI's request that Kidd sign an application "requesting the FCC to assign the radio license."¹³ On May 18, 2001, pursuant to PBI's motion to reopen the trial on the issue of assignment of the station license, the Orange County Superior Court issued the Tentative Decision After Reopening of Trial on the Issue of the Award, Transfer or Assignment of Station License ("Second Tentative Decision").¹⁴ In the Second Tentative Decision, which became the final court decision on this matter, the court ordered Kidd to sign an application seeking the Commission's consent to assign the license to PBI. Kidd refused to do so. The court then appointed its Clerk, Alan Slater, as Trustee for the purpose of executing an assignment application on Kidd's behalf.¹⁵

5. As noted above, the staff granted the assignment to the Trustee and, subsequently, from the Trustee to PBI.¹⁶ Although Kidd had willingly executed the New Note, Kidd argued to the Commission that the default-remedy clause in question violates Section 73.1150 of our rules. In support of this claim, Kidd relied primarily on two cases in which the Commission found such a violation.¹⁷ Kidd largely reiterates its same arguments on review and asserts that both grants of the above-captioned assignment applications contravene Section 73.1150.

6. **Discussion.** We do not agree with Kidd that the New Note provision at issue violates the reversionary interest rule. Section 73.1150, titled "Transferring a station," states in relevant part:

(a) *In transferring a broadcast station*, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever.

(b) No license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.¹⁸

¹¹ See Joint Opposition to Application for Review at 6.

¹² KTHO(AM) remained silent until the station resumed operations on October 16, 2001. See *Letter from Erwin G. Krasnow, Esq.* (Oct. 19, 2001). See also *infra* ¶ 13.

¹³ See September 28, 2001, Consolidated Reply to Joint Opposition to Petition to Deny and Opposition to Petition for Reconsideration ("Consolidated Reply"), Attachment 3 (Orange County Superior Court, Central Dist., Case No. 00 CC0 1383, Minute Order, Jan. 25, 2001).

¹⁴ See Consolidated Reply, Attachment 6 (Orange County Superior Court, Central Dist., Case No. 00 CC0 1383, Minute Order, May 18, 2001).

¹⁵ See Consolidated Reply, Attachment 2. The court also enjoined Kidd from assigning the KTHO(AM) license to any entity other than PBI. See *id.*

¹⁶ See *supra* ¶ 1.

¹⁷ The two cases are: *Radio KDAN, Inc.*, 11 F.C.C.2d 934 (1968), *recon. denied*, 13 R.R.2d 100 (1968), *aff'd on procedural grounds sub nom.*, *W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969) ("*Radio KDAN*"); and *Kirk Merkley, Receiver*, 94 F.C.C.2d 829, 837 (1983), *recon. denied*, 56 R.R.2d 413 (1984), *aff'd sub nom. Merkley v. FCC*, 776 F.2d 365 (D.C. Cir. 1985) ("*Merkley*").

¹⁸ 47 C.F.R. § 73.1150(a), (b) (emphasis added).

7. On its face, Section 73.1150 applies exclusively to contracts executed in conjunction with the transfer of a station. Thus, to implicate Section 73.1150, a licensee must retain or reserve one of the rule's delineated rights in conjunction with the transfer of control of a station or an assignment of license. Once the parties have consummated a Commission-approved sale, we consider the transfer completed and Section 73.1150 no longer applicable. Of course, if an agreement raising a reversionary interest issue were to come to our attention subsequently, having been executed either prior to or in connection with the sale's consummation, we would evaluate it under Section 73.1150.¹⁹ That, however, is not the case here.

8. There is nothing in the history of the rule to indicate that the Commission ever intended Section 73.1150 to apply to a contract executed two years after the transfer of a station, in the context of litigation, as was the case with the New Note. In its 1949 adoption of the precursor to the current rule,²⁰ the Commission emphasized that a station licensee is fully responsible for the conduct of the station and its operation in the public interest, and that such responsibility cannot be delegated by contract or otherwise.²¹ Licensees were inclined to reserve programming time on the stations they were selling, and buyers were accommodating these reservations as consideration for the sale.²² This practice led the Commission to adopt rules restricting reservation-of-time contracts to safeguard licensee control. Notably, the rules were titled "Special Rules Relating to Contracts Providing for Reservation of Time Upon Sale of a Station" (emphasis added). The rules were clearly intended to apply to a sale, and not to subsequent developments. The Commission stated that "it is not in the public interest and inconsistent with the nature of the rights conferred by a licensee . . . and duties for owners of radio stations as part of the consideration for the transfer of such stations[] to reserve the right of use of radio time on the station being sold, to attempt to obtain a right of reverter of license, or to obtain other rights which under the Communications Act can be exercised only by licensees."²³ Present-day Section 73.1150 emerged pursuant to a 1979 *Order*²⁴ and consolidated separate rules for the AM, FM, and television services.²⁵ New Section 73.1150 was retitled "Transferring a station." The new title was intended to reflect the rule's reference to more than the reservation of time, as "the text refers also to rights of reversion and reassignment of license."²⁶ It remained explicit, however, about the rule's scope, limited to arrangements made in connection with a station sale. By its history, title and terms, Section 73.1150 has pertained to the context of a station transfer, and not to later arrangements.²⁷

¹⁹ See, e.g., *Radio KDAN*, *supra* note 17.

²⁰ The original rule appeared in three separate sections of our rules, applying respectively to AM, FM and television services: 47 C.F.R. §§ 3.109, 3.241, and 3.641 (1949).

²¹ See *Promulgation of Sections 3.109, 3.241 and 3.641 Containing Special Rules Relating to Contracts Providing for Reservation of Time Upon Sale of a Station*, 43 F.C.C. 405, 406 (1949) ("*Time Reservation Rules*"), *recon. denied*, 43 F.C.C. 409 (1949).

²² See, e.g., *James A. Noe*, 14 F.C.C. 146 (1949).

²³ *Time Reservation Rules*, 43 F.C.C. at 406 (emphasis added).

²⁴ *Reregulation and Rules Oversight of Radio and TV Broadcasting*, FCC 79-610, 44 Fed. Reg. 58719 (1979). Following its occasional practice, the Commission published only a summary of the adopted *Order* which stated, in part: "In radio and TV b/c'ing reregulation program, Part 73 of Rules amended to clarify and rewrite the 'sale of a station' rule (Sec. 73.1150)" 73 F.C.C.2d 828 (1979).

²⁵ By 1979, the original rule sections (*see supra* note 20) had been moved to the following sections: 47 C.F.R. §§ 73.139, 73.241, and 73.659 (1979).

²⁶ 44 Fed. Reg. at 58719.

²⁷ Notably, under current Commission rules, a former licensee would not be prohibited from entering into various contractual arrangements subsequent to the sale of the station, such as an option to purchase the station at a future time, or a time brokerage agreement ("TBA," also known as a local marketing agreement). A prospective purchaser is also permitted under our rules to enter into a TBA with the seller, providing programming to the station while the

(continued....)

9. The Original Note was contained within the 1995 PBI-to-Kidd assignment of license application. As it had been executed in conjunction with the 1995 station transfer, the staff appropriately evaluated it in light of the provisions of Section 73.1150. The staff correctly determined that the assignment application complied with Commission rules. In particular, the Original Note explicitly excluded the license as a secured asset. We are not bound by the finding of the Orange County Superior Court which later resolved a different issue on a different record. Moreover, Kidd has not alleged that the Original Note was problematic under our rules or the statute. The New Note was neither executed nor filed in association with an assignment of the license of KTHO(AM) to Kidd. Rather, PBI and Kidd negotiated the New Note two years later to cure a breach of contract and resolve then-pending civil litigation.²⁸ Accordingly, whatever consideration was conveyed to *former* licensee PBI by the New Note, such consideration cannot implicate Section 73.1150. The New Note simply falls beyond the rule's scope. The major cases cited by Kidd in which the Commission found a reversionary interest -- *Radio KDAN* and *Merkley*²⁹ -- are factually distinguishable from the instant matter. Both cases involved contracts executed in connection with the assignment of license or transfer of control of a station, either prior to or at closing.³⁰ In sum, we reject Kidd's argument that the New Note conferred a reversionary interest to PBI in violation of Section 73.1150.

10. We also find that accommodation of the Orange County Superior Court's decision is appropriate. PBI contends that the Commission has approved arrangements similar to those at issue here and cites specifically to *Arecibo Radio Corp.* ("*Arecibo*").³¹ Kidd asserts that *Arecibo* is inapposite because the parties did not raise particular contractual provisions alleged to violate Section 73.1150. We disagree with Kidd. Following a transfer of control of the licensee, the new shareholders -- who had agreed to installment payments -- were sued by the former shareholders. Finding in favor of the former shareholders, the court ordered that the assets be sold at public auction, and the former shareholders were the successful bidders. In further judicial proceedings, however, the court determined that the value of the station assets without the licenses was incomplete,³² and that the Commission should have an opportunity to consider whether the station license should be assigned to the party which had obtained the station's physical assets at auction.³³ The court therefore ordered the new shareholders -- who held the licenses -- to sign the necessary Commission applications to assign the licenses back to the former shareholders.³⁴ The Commission granted that assignment of the licenses to the seller. In so doing, the Commission stated that the court's action had not interfered with the new shareholders' "right to assert

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sales application is pending. In the event such arrangements could vest control in a party other than the current licensee, a petitioner or complainant may raise these concerns in the context of, *inter alia*, the assignment application, the station's license renewal application, or a formal complaint to the Commission's Enforcement Bureau.

²⁸ See *supra* ¶ 2.

²⁹ See *supra* note 17.

³⁰ For the first time on review, Kidd also introduces an unpublished staff decision that found a facial violation of Section 73.1150. See *Letter to Veronica D. McLaughlin, Esq. and David L. Hill, Esq.*, Ref. No. 1800B3-MFW (MMB, Apr. 9, 1999). There also, however, the contract had been executed at consummation of the sale. Moreover, an unpublished decision has no precedential value for unrelated parties. See 47 C.F.R. § 0.445(e).

³¹ 101 F.C.C.2d 545 (1985).

³² *Id.* at 547.

³³ *Id.* at 549.

³⁴ Ultimately, the court ordered its Marshall to sign the application on behalf of the new shareholders who, like Kidd, had defied the court's order.

before the Commission any argument regarding the assignment applications, and the court specifically left to the Commission the determination of all public interest issues which might be raised by the applications.”³⁵ The Commission also noted the public benefit of granting assignment of the license to the party that was in a position to resume operations and to provide service to the public.³⁶ Recognizing that “[a station’s] operating authorization must usually accompany [its] physical assets,” the Commission found “no reason to depart from that principle” on the facts of *Arecibo*.³⁷

11. Although *Arecibo* did not present an issue under Section 73.1150, it is directly relevant to our analysis because it illustrates the Commission’s long-standing policy to accommodate court decrees unless a public interest determination under the Act compels a different result.³⁸ The Commission normally defers to judicial determinations regarding private contractual disputes and the interpretation and enforcement of contracts for the sale of a broadcast station,³⁹ while the Commission retains exclusive authority to license broadcast stations.⁴⁰ Often we must reach a fair accommodation between our licensing jurisdiction and the power of state and local courts to adjudicate contractual disputes.⁴¹ Indeed, the U.S. Supreme Court has stated that “the principle of fair accommodation between State and federal authority . . . *should* be observed” if the state’s laws “can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest” which underlies licensing decisions.⁴²

12. Accommodation of the court’s decision to compel Kidd to sign an application seeking assignment of the license to the Trustee and then to PBI contravenes neither the Act nor our rules. In its pursuit of a remedy for Kidd’s default, and as a result of Kidd’s various other actions, PBI had to engage in protracted litigation in two separate courts. In the exercise of its jurisdiction, the Orange County Superior Court determined that Kidd had breached its contract with PBI. As noted above, PBI returned to the court seeking to persuade it that Kidd should cooperate in an assignment application for return of the license to PBI. Initially, PBI failed in that effort: based on its review of the relevant documents, the court concluded that there was no evidence that the station property subject to the New Note included the license.⁴³ It was only after the court reopened the case on PBI’s motion and PBI returned to present additional witness testimony that the Orange County Superior Court reversed itself. By then, more than a year had passed since PBI had been awarded title to the station’s transmission equipment, towers and land. The court eventually fashioned a remedy that directed Kidd to sign an assignment application to

³⁵ *Arecibo*, 101 F.C.C.2d at 549.

³⁶ *Id.* at 550-51.

³⁷ *Id.* at 550 (citing *Merkley*, 94 F.C.C.2d at 829).

³⁸ *Arecibo* also demonstrates that, even without any particular default-remedy clause in the parties’ contract, courts may reasonably find it necessary to have the station licenses accompany the tangible assets in order to make the breached party whole. See also *O.D.T. International*, 9 FCC Rcd 2575, 2576 (1994); *LaRose v. FCC*, 494 F. 2d 1145 (D.C. Cir. 1974).

³⁹ *Arecibo*, 101 F.C.C.2d at 545; *John R. Runner, Receiver (KBIF)*, 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992).

⁴⁰ See 47 U.S.C. §§ 301, 304, 309(h), 310(d). Accordingly, the interpretation and enforcement of the Commission’s rule prohibiting reversionary interests in a broadcast license is a matter within the Commission’s jurisdiction. 47 C.F.R. § 73.1150.

⁴¹ See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-32 (1945) (“*Radio WOW*”). See also *O.D.T. International*, 9 FCC Rcd at 2576 (Commission must reconcile its rules and policies with federal and state court mandates designed to protect creditors).

⁴² *Radio Wow*, 326 U.S. at 132 (emphasis added).

⁴³ See *supra* ¶ 4.

fully cure PBI's injury. The court properly reserved to the Commission the resolution of all public interest issues concerning the assignment applications. Kidd's ability to advance any argument while the applications were pending before the Commission was in no way impaired by the court's order. In these respects, the court's remedy was indistinguishable from the remedy approved by the Commission in *Arecibo*.⁴⁴

13. Furthermore, as in *Arecibo*, we find that accommodation of the court's order in this case best serves the public interest. Grant of the subject applications returned KTHO(AM) to broadcast operations after almost a year of discontinued service. If the station had not resumed operations by October 18, 2001, the KTHO(AM) license would have been forfeited by operation of law.⁴⁵ Hence, as a practical matter, severance of the licensed facilities from the license would have "disable[d] the Commission from protecting the public interest committed to its charge,"⁴⁶ as listeners would have been deprived of the broadcast service provided by KTHO(AM) for a more prolonged period -- and possibly indefinitely. Kidd never indicated to the Commission that it would have been able to return the station to the air prior to forfeiture of the license. Instead, Kidd pursued a course that jeopardized the license, hindering measures that would allow for compensation to the party injured by Kidd's adjudicated breach of contract and unlawful detention of the station's real property. In sum, we find that the New Note does not violate Section 73.1150 and that the public interest is served by grant of the subject applications to PBI, whom we find fully qualified to be a Commission licensee.

14. Accordingly, IT IS ORDERED that the November 16, 2001, Application for Review filed by Kidd Communications IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁴ See *Arecibo*, 101 F.C.C.2d at 550.

⁴⁵ See 47 U.S.C. § 312(g); 47 C.F.R. § 73.1740(c) (if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, the station license expires at the end of that period).

⁴⁶ *Radio WOW*, 326 U.S. at 132.